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Nos. 14-556, 14-562, 14-571, and 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

[ADDITIONAL CAPTIONS LISTED ON INSIDE COVER]

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF TEXAS VALUES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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VALERIA TANCO, ET AL., PETITIONERS

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.

APRIL DEBOER, ET AL., PETITIONERS

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

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INTEREST OF AMICUS

Amicus Curiae Texas Values seeks to preserve and advance a culture where families prosper and every human life is valued. Texas Values promotes its core values of faith, family, and freedom through policy research, public education, and grassroots mobilization. Amicus believes that strong families are founded on the ideal of a lifelong marriage of one man and one woman, and is committed to preserving marriage as an institution inherently linked to procreation and childrearing, one that connects children to their mothers and fathers, for the good of children and society as a whole. Because this case questions the constitutionality of a state's sovereign decision to preserve marriage as the union between one man and one woman, Amicus has an interest in responding to the constitutional claims that the petitioners assert.[1]

SUMMARY OF ARGUMENT

This case is not about whether the States should recognize same-sex marriage. It is about the question of who decides. The decision of whether (and when) to make this revolutionary social change belongs to the people and their elected representatives. The States did

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[1] Neither the parties nor their counsel authored any part of this brief. Nor did they contribute any money toward its preparation or submission. *See* Sup. Ct. R. 37.6. The petitioners were notified of and have consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a). The respondents have filed a blanket consent.

not surrender this authority to the federal judiciary when they ratified the Fourteenth Amendment.

The court of appeals and the respondents' briefs have capably explained why this Court lacks the authority to impose same-sex marriage on the States. The amici offer three additional points.

First, the constitutional case for same-sex marriage rests on an ideological judgment that the institution of marriage exists primarily to celebrate the love and commitment of two people. The opponents of same-sex marriage, by contrast, believe that marriage and human sexuality should be used primarily to generate positive externalities for society, by encouraging procreation and by deterring irresponsible behaviors (such as out-of-wedlock births) that impose costs on others. On this view, the love-and-personal-fulfillment component of marriage is important but secondary to society's needs for promoting the creation of new offspring while discouraging out-of-wedlock births. That view of marriage may not be fashionable among the illuminati, but that does not make it irrational or unconstitutional. The petitioners are asking this Court to commit the sin of *Lochner*: Nullify a state law based on philosophical beliefs widely held by elites, while refusing to acknowledge competing values that rationally inform the legislature's decision. *Cf.* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. Chi. L. Rev. 373 (2003). The Fourteenth Amendment does not enact the ideology of the sexual revolution.

Second, the arguments for "heightened scrutiny" offered by the petitioners and the Solicitor General are

meritless. The States' marriage laws do not classify based on sexual orientation, and even if they did homosexuals cannot qualify as a "suspect class" because they wield substantial political clout and because sexual orientation is not an immutable trait.

Finally, if same-sex marriage is to legalized, it is far preferable that it occur through state-by-state democratic change rather than nationwide judicial imposition. Same-sex marriage is an exceedingly recent phenomenon. Leaving matters to the States will generate reliable data on the empirical effects of same-sex marriage, enabling future policymakers to determine whether this novel social innovation is enlightened or misguided. A federalist solution will also facilitate peace by avoiding a nationalized, one-size-fits-all solution and enabling the supporters and opponents of same-sex marriage to migrate to jurisdictions with more agreeable laws. *See Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("Our Constitution is made for people of fundamentally differing views."). In addition, the federalist solution is consistent with popular sovereignty and will allow the legalization of same-sex marriage to enjoy a democratic pedigree and legitimacy that the legalization of abortion lacks because it was imposed by an overreaching court decree. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 37 (1985); Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081, 2085 (2005) ("The issue of same-sex marriage is best handled through democratic areas and at the state level."). For these reasons, even supporters of same-sex

marriage should reject its imposition by the federal courts.

Most of all, the relief sought by the petitioners—nationwide judicial imposition of same-sex marriage in the name of "interpreting" the Constitution—will reinforce perceptions of the federal judiciary as a naked political institution that can be used to short-circuit the federalist and democratic processes of state-by-state change. Court-imposed same-sex marriage will galvanize other interest groups awed by the success of the same-sex marriage movement, who will increase pressure on the President and Senate to appoint judges who will impose *their* policy goals from the bench. More and more, judicial selection will be determined not by legal ability but by ideological conformity with the views of powerful interest groups. The Court should counter these trends by rejecting the petitioners' claims and making clear that it will not entertain attempts to enlist the federal judiciary in political crusades.

ARGUMENT

I. THE STATE'S MARRIAGE LAWS EASILY SURVIVE RATIONAL-BASIS REVIEW

The disagreements over whether same-sex marriage should be legal arise from differences in value judgments and differing views over the answers to disputed empirical questions. The petitioners' arguments are based on the ideology of the sexual revolution, which views marriage and human sexuality as existing primarily for love and personal fulfillment. Same-sex marriage follows naturally from that worldview—as does no-fault divorce, legalized abortion, subsidies for contraception, tolerance

of non-marital sexual relations, and subsidizing out-of-wedlock births through the welfare state. This philosophy is popular among liberals, progressives, and academics. And for some it has attained an almost natural-law status in their way of thinking.

Others, however, believe that marriage and human sexuality should be used primarily to generate positive externalities for society. The love-and-personal-fulfillment component is a collateral benefit but takes a back seat to society's needs for encouraging procreation, ensuring that childrearing occurs in stable, intact families with both a mother and father, and deterring behaviors that impose negative externalities (such as abortions, out-of-wedlock births, and the spread of disease). There is nothing "religious" about this perspective on marriage and sexuality; it is held by many secular individuals and defended in secular terms. *See, e.g.*, James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (2002). But it is correlated with religious belief, and this is unsurprising given that most faith traditions teach their adherents to exalt the needs of others and society over individualized pursuits of happiness or personal gratification.

This way of thinking about marriage and sexuality is foreign to many in today's society. But that does not make it unconstitutional—and it does not make the States' marriage laws irrational when they are easily explained from a perspective on marriage that emphasizes its role in producing societal benefits. Committed, lifelong, opposite-sex marriages generate two types of positive externalities for society that same-sex unions do not.

First, opposite-sex marriages produce offspring, which are needed to ensure economic growth and the survival of the human race. Same-sex unions are biologically incapable of producing children, and every child adopted by a homosexual parent is the product of some type of opposite-sex union. It is therefore rational for the State to subsidize opposite-sex marriages, which are likely to benefit society by producing new offspring, while withholding that subsidy from same-sex marriages, which are far less likely to produce this particular societal benefit.

Of course not all opposite-sex marriages produce children. Some couples are sterile; some are deliberately childless. But rational-basis review does not require a perfect fit between means and ends. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). It is enough if the States can show that opposite-sex marriages are more likely than same-sex marriages to produce children—indeed, it is enough if one could rationally speculate that opposite-sex marriages *might* be more likely than same-sex marriages to produce children. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[L]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). The petitioners do not deny that one could rationally hold this belief; they do not even deny the empirical claim that opposite-sex married couples are more likely than same-sex couples to create new offspring. That concedes that the States' marriage laws survive rational-basis review.

Second, opposite-sex marriage reduces out-of-wedlock births by channeling procreative heterosexual intercourse into marriage. The sexual practices of homosexuals do not result in pregnancy, so same-sex marriage does not further this goal. The petitioners contend that recognizing same-sex marriage will do nothing to *undermine* the State's interests in promoting reproduction and reducing out-of-wedlock births, but that is irrelevant when conducting rational-basis review. A State can rationally conclude that recognizing same-sex marriages will not further those interests—or that it will not further these interests to the same extent as opposite-sex marriage. Marriage is a government subsidy, and a State may reserve its subsidies for behaviors that are most likely to generate the positive externalities that the State seeks to promote.

The States' marriage laws are rationally related to yet a third government interest, and that goes to the expressive function of a State's marriage laws. *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996). Supporters of traditional marriage oppose laws that express an endorsement of sexual-revolution ideology or genderless marriage, while supporters of same-sex marriage oppose laws that express a view that opposite-sex marriages are preferable to other living arrangements. A State may choose to have its marriage laws reflect either of these competing views. The respondents have chosen to have their States' marriage laws reflect the view that the primary purpose of marriage and hu-

man sexuality is to generate positive externalities for society—rather than to confer legal recognition and subsidies on any two people who happen to love each other. That perspective on marriage may not be as fashionable as it once was, but it is assuredly rational, and it is held by many thoughtful and distinguished scholars as well as millions of ordinary Americans. *See, e.g.*, Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (2008), http://bit.ly/1zkm0al (signed by over 70 scholars); Institute for American Values, *Marriage and the Law: A Statement of Principles* (2006), http://bit.ly/1qEhf7u (signed by more than 100 scholars).

The petitioners' failure to understand why so many of their fellow Americans oppose same-sex marriage should not have led them to dismiss their views as irrational. Instead, it should have led them to read some of the many scholarly defenses of traditional marriage—none of which the petitioners so much as acknowledge (let alone refute) in their briefs. *See, e.g.*, Sherif Girgis, Robert P. George, and Ryan T. Anderson, *What Is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2014); James Q. Wilson, *Against Homosexual Marriage*, Commentary (March 1, 1996), http://bit.ly/1m5SK1b; George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004). The petitioners also ignore Jonathan Haidt's work explaining how conservatives and liberals differ in their conceptions of morality—which largely explains their divergent views on the same-sex marriage issue. *See, e.g.*, Jonathan Haidt and Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recog-*

nize, 20 Social Justice Research 98, 111–12 (2007) ("[O]n the issue of gay marriage it is crucial that liberals understand the conservative view of social institutions. Conservatives generally believe . . . that human beings need structure and constraint to flourish, and that social institutions provide these benefits. . . . These are not crazy ideas."); Jesse Graham, Jonathan Haidt, and Brian Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 Journal of Personality and Social Psychology 1029 (2009). On rational-basis review, the petitioners' burden is to negate *every conceivable rationale* that might be offered for a law—and that requires them to refute every scholarly defense that has been offered for traditional marriage, as well as scholars (such as Haidt) who defend the *rationality* of those who support traditional marriage. *See Beach Commc'ns*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotations omitted). One does not refute arguments by ignoring them.

More importantly, it is not possible to "refute" the belief that the institution of marriage exists primarily to generate positive externalities such as the production of children and the raising of children in stable, committed family structures with both a mother and a father. Many liberals and progressives *disagree* with that understanding of the purpose of marriage, but that is nothing more than a normative value judgment and it does not supply a basis for a constitutional holding. Disagreements over the purpose of marriage are no different from normative

disagreements in other areas of law. Some believe that the primary purpose of tort law is deterring negligent behavior by tortfeasors; others emphasize the corrective-justice concerns of ensuring compensation for accident victims. Some believe that antitrust law should pursue economic efficiency and consumer welfare; others think it should protect "small dealers and worthy men" from competitive market forces. Some believe that food law should pursue libertarian aims; others think it should promote nutrition or ensure the ethical treatment of animals. People who disagree over these issues do not call their opponents' views "irrational" or "unconstitutional." Instead, they recognize that their opponents are proceeding from a different normative framework that emphasizes certain values over others—and they further recognize that rational people can disagree over which values should take priority. Those who support traditional marriage deserve similar courtesy from the petitioners and from this Court.

II. THE PETITIONERS' ARGUMENTS FOR HEIGHTENED SCRUTINY ARE UNTENABLE

The petitioners and the Solicitor General contend that the States' marriage laws should be subjected to "heightened scrutiny," but their arguments are untenable for numerous reasons.

First, even if one were to accept the petitioners' claim that homosexuals should qualify as a "suspect class," the States' marriage laws do not classify based on sexual orientation. Everyone is subjected to the same definition of marriage, without regard to one's sexual orientation. The States' marriage laws equally prevent heterosexual

same-sex friends from marrying each other and claiming the tax benefits (and other benefits) associated with that status.[2] And homosexuals are as free to marry an opposite-sex spouse as anyone else in the State. A law that applies equally to everyone does not "classify" simply because some identifiable group wants to violate it. Laws that restrict smoking in public places do not implicate the equal-protection rights of smokers—because these laws (like the States' marriage laws) impose a uniform standard of conduct applicable to all people. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (facially neutral buffer zone is "neither content nor viewpoint based," even though the only speech affected would come from one particular viewpoint); *see also Reynolds v. United States*, 98 U.S. 145 (1878); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990).

To be sure, the States' marriage laws may have a *disparate impact* on homosexuals. But disparate-impact claims are not cognizable in equal-protection law. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). Only laws that expressly *classify* according to suspect criteria trigger heightened scrutiny. *See Beach Commc'ns*, 508 U.S.

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[2] Not all persons who wish to marry a same-sex partner will have a homosexual orientation. The plaintiffs in *McNosky v. Perry*, No. 1:13-cv-00631-SS (W.D. Tex.), have publicly admitted that they have a heterosexual orientation and plan to marry each other as a statement of solidarity with same-sex couples. *See* Anna Waugh, *Tarrant County Marriage Plaintiffs Come Out as Straight*, Dallas Voice (May 16, 2014, 7:05 A.M.), http://www.dallasvoice.com/tarrant-county-marriage-plaintiffs-straight-10172981.html (last visited on March 30, 2015).

at 313 ("In areas of social and economic policy, a statutory *classification* that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (emphasis added)). When a law does not classify based on one's membership in a suspect class, but merely has a disparate impact on that suspect class, it is reviewed under the rational-basis standard. *See Davis*, 426 U.S. at 239.

The only classifications that appear in the States' marriage laws are based on sex, age, and consanguinity—not sexual orientation.[3] The petitioners and the Solicitor General appear to believe that heightened scrutiny should apply simply because persons with a homosexual orientation are disadvantaged by a law—even when the law does not expressly classify based on sexual orientation. That would give homosexuals a status under the Equal Protection Clause even more protective than that conferred upon racial minorities. *See Davis*, 426 U.S. at 239.

Second, this Court has never held that homosexuals are a "suspect class," and the arguments for suspect-class status are far weaker now than they were 20 years

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[3] The petitioners' claim that the States' marriage laws embody unconstitutional sex discrimination is meritless for the reasons presented in the respondents' briefs. *See also Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139–40 (D. Or. 2014).

ago. Homosexuals have enormous political clout, especially in the Democratic Party, and their political power is growing. Congress recently repealed the military's "Don't Ask, Don't Tell" policy, and the President signed an executive order prohibiting sexual-orientation discrimination by federal contractors without exempting religiously oriented businesses. *But see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Boy Scouts v. Dale*, 530 U.S. 640 (2000). And Attorney General Eric Holder and several state attorneys general took the extraordinary step of refusing to defend traditional marriage laws in court. In light of these successes, the Solicitor General's suggestion that homosexuals lack sufficient political power borders on preposterous. *See* U.S. Br. 17, 19–20. The Solicitor General complains that some States have been less solicitous of the homosexual agenda, but no constituency wins 100% of its political battles. If the inability to get a law changed through democratic processes were sufficient evidence of political powerlessness, then every claimant who had to resort to a lawsuit would pass the test.

Third, sexual orientation is not an "immutable" characteristic akin to race. Some say that sexual orientation tends to be stable—more so for men than for women.[4]

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[4] *See* Roy F. Baumeister, *Gender Differences in Erotic Plasticity: The Female Sex Drive as Socially Flexible and Responsive*, 126 Psychological Bulletin 347–74 (2000); Lisa M. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (2008); Lisa M. Diamond, *Was It a Phase? Young Women's Relinquishment of Lesbian/Bisexual Identities over a 5-Year Period*, 84 Journal of Personality and Social Psychology 352–64 (2003); Lisa M. Diamond, *De-*

(continued...)

And although some have cited evidence of a genetic *aspect* to homosexuality,[5] that does not make it an "immutable" characteristic akin to race. Professor Lisa Diamond's book, *Sexual Fluidity: Understanding Women's Love and Desire* (Harvard University Press 2009), argues that women exhibit a large degree of sexual plasticity or fluidity, characterized by non-exclusivity, inconsistency, and change in reported sexual identity and in sexual behaviors. Professor Diamond also provides evidence of longitudinal change and self-reports that are inconsistent with an "immutable" orientation. Across six longitudinal studies, she notes that 75 percent of women who identified as lesbian, bisexual, or unlabeled changed their self-reported identity (at least once) within six years of having first coming out. *See* Lisa M. Diamond, *I was wrong! Men are pretty darn sexually fluid, too*, So-

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velopment of Sexual Orientation Among Adolescent and Young Adult Women, 34 Developmental Psychology 1085–95 (1998); Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 Journal of Social Issues 329–50 (2000).

[5] *See* J. Michael Bailey, Michael P. Dunne, and Nicholas G. Martin, *Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample*, 78 Journal of Personality and Social Psychology 524–36 (2000); Peter S. Bearman and Hannah Bruckner, *Opposite-sex Twins and Adolescent Same-sex Attraction*, 107 Am. J. of Sociology 1179–1205 (2002); Niklas Långström, Oazi Rahman, Eva Carlström and Paul Lichtenstein, *Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden* 39 Archives of Sexual Behavior 75–80 (2010).

ciety for Personality and Social Psychology Preconference on Sexuality, Austin, TX (February 13, 2014). Even the study most commonly touted by supporters of same-sex marriage reports that only 84% of lesbians (and 95% of male homosexuals) agreed that they "had little or no choice about their sexual orientation." *See* G.M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176, 186, 188 (2010). That means that there *is* some malleability in sexual orientation, especially among women. Calling sexual orientation "immutable" is hyperbole—and the Solicitor General's brief is carefully phrased to *avoid* claiming that sexual orientation is immutable.[6]

Finally, there is no "fundamental right" to same-sex marriage because same-sex marriage is not "deeply rooted in this Nation's history and tradition." *See Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). The peti-

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[6] *See* U.S. Br. 11–12 ("[D]scrimination against lesbian or gay people is based on an immutable *or distinguishing* characteristic.") (emphasis added); *id.* at 19 ("The broad consensus in the scientific and medical community is that sexual orientation is not a choice for lesbian and gay people *any more than it is for their straight neighbors*.") (emphasis added). This is not a claim that sexual orientation is "immutable," and the Solicitor General does not dispute (or even acknowledge) Professor Diamond's findings that sexual orientation is fluid, particularly among lesbians. The judges who have played amateur scientist by declaring sexual orientation "immutable" are out of their depth on this question. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

tioners and some courts try to get around this problem declaring a generalized "right to marry" to be "deeply rooted" in history and tradition—and then announcing that this "deeply rooted" right includes the right to marry any person of one's choice, including a same-sex partner. *See, e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1209–10 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 375–77 (4th Cir. 2014). There are many problems with this approach. To begin, *Glucksberg* requires court to apply a "careful description" of the alleged right when undertaking the historical inquiry. *See Glucksberg*, 521 U.S. at 703. This means that judges cannot declare a right that is *not* "deeply rooted in this Nation's history and tradition" (such as a right to same-sex marriage) to *be* "deeply rooted in this Nation's history and tradition" by boosting the level of generality at which the right is defined. *See id.*; U.S. Const. art. V; Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665; Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349 (1992). And in all events, even if the petitioners' abstraction maneuver were permissible, it is demonstrably false to assert that a generalized "right to marry" a partner of one's choosing is "deeply rooted in this Nation's history and tradition." The States have always restricted one's choice of marriage partner, forbidding not only same-sex marriages but also non-consensual marriages, marriages between close relatives, and marriages involving persons below the age of consent.

III. LEGALIZATION OF SAME-SEX MARRIAGE THROUGH DEMOCRATIC PROCESSES IS FAR PREFERABLE TO LEGALIZATION THROUGH JUDICIAL DECREE

It is possible that some members of this Court will not be persuaded that the judiciary lacks the power to impose same-sex marriage on the States. But even jurists who are convinced that they have the *power* to force same-sex marriage on the States should nevertheless refrain from doing so and allow the attempts to redefine marriage to occur through democratic processes.

First, same-sex marriage has not existed long enough to generate reliable data regarding its effects on opposite-sex marriage, parenting, procreation, and public health. Allowing the States to decide whether (and for how long) to proceed with this novel social experiment will help policymakers determine whether same-sex marriage is a good idea. Court-imposed same-sex marriage will forever entrench a constitutional rule, making it harder to study the effects of same-sex marriage (because it will no longer be possible to compare outcomes in the States that permit the practice with outcomes in the other States), and disabling legislatures from changing course if it turns out that same-sex marriage has some negative or unintended side effects. This is one of the principal reasons that constitutional federalism exists—and it will be obliterated by the nationwide imposition of same-sex marriage via judicial edict. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory;

and try novel social and economic experiments without risk to the rest of the country."); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Second, a federalist solution to the same-sex marriage debate will facilitate national peace and maximize political-preference satisfaction, by allowing both the supporters and opponents of same-sex marriage to vote with their feet and migrate to jurisdictions with more agreeable laws. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1483, 1493–94 (1987). The petitioners find this solution abhorrent, because they are unwilling to tolerate the prospect that any State would adopt a policy on same-sex marriage that departs from what they believe to be right and just. But that is the price one must pay for living in a federal republic; some States may adopt policies that others find deeply offensive or immoral. Those who support traditional marriage are no doubt equally dismayed at the acceptance of same-sex marriage in New England and on the west coast. But in the words of Justice Holmes, our Constitution "is made for people of fundamentally differing views," and federalism gives each side of the same-sex marriage debate a second-best solution. *See Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). The petitioners believe that our Constitution is made only for those who support same-sex marriage.

Third, same-sex marriage will receive less public acceptance if it is legalized by judicial ukase rather than by democratically elected legislatures. Many supporters of legalized abortion have made similar arguments in criticizing *Roe v. Wade*, 410 U.S. 113 (1973), for (paradoxically) undermining the cause of abortion rights. Abortion law was already moving in the direction of liberalization before *Roe*, and *Roe*'s decision to constitutionalize the issue galvanized the anti-abortion movement and triggered a backlash against the Court's needlessly overbroad opinion. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 37 (1985). If *Roe* had adopted a "minimalist" holding, by invalidating only the most restrictive anti-abortion laws, while allowing the democratic process to resolve the remaining issues surrounding the legality of abortion, then many believe the right to abortion would be more widely accepted today. *See* Interview by J.J. Helland with Cass R. Sunstein, *Courting Disaster*, salon.com (September 12, 2005), http://bit.ly/1CEmZ7X (last visited March 30, 2015). These criticisms of *Roe* are equally applicable to the plaintiffs' efforts to constitutionalize a right to same-sex marriage. *See* Michael W. McConnell, *The Constitution and Same-Sex Marriage*, Wall St. J. (March 21, 2013), on.wsj.com/1mknYDB ("Change that comes through the political process has greater democratic legitimacy.").

Fourth, court-imposed same-sex marriage will threaten the First Amendment freedoms of persons and institutions that oppose homosexuality and same-sex marriage. When same-sex marriage is legalized by legis-

latures, the people and their legislators have an opportunity to seek explicit protections for religious institutions and other dissidents, as such exemptions could be needed to secure passage of the legislation. *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case Western L. Rev. 1161, 1162 (2014) ("In jurisdictions that voluntarily enacted same-sex marriage, religious liberty protections for religious objectors who adhere to a heterosexual view of marriage—exempting them from requirements to facilitate marriages inconsistent with their religious beliefs, by providing a reception hall, for example—proved vital to the legislation's success."); *id.* at 1162–63 (describing the judicial imposition of same-sex marriage as "fraught with risk for religious dissenters while legislative or popular enactments offer important, if flawed, protections to religious organizations and individuals.").

Judicial imposition of same-sex marriage will not contain these protections, and it will remove any need for the supporters of same-sex marriage to agree to these protections in exchange for the passage of a same-sex marriage bill. The need for these protections is real. Elected officials in Boston, Chicago, and San Francisco threatened to deny business licenses to Chick-fil-A after its President spoke out against same-sex marriage. A judicial pronouncement that opposition to same-sex marriage is "unconstitutional" (and therefore un-American) will further embolden public officials to engage in these bullying tactics against those who speak in support of traditional marriage. And one should not assume that the

First Amendment will come to their rescue. The same elected officials who want to punish Chick-fil-A for supporting traditional marriage will lobby for the appointment of judges who will find a "compelling" government interest in eradicating alleged or perceived discrimination and stigma against same-sex couples. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 604 (1983); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (contending that the government can satisfy RFRA's strict-scrutiny standard by relying on "compelling governmental interests in uniform compliance with the law"). At the end of the day, the First Amendment is mere words on a piece of paper, and words offer no protection without institutions to enforce them.

Finally, the judicial imposition of same-sex marriage will cement perceptions of the federal judiciary as a naked political institution that creates and enforces constitutional rights according to whatever happens to be trendy or fashionable. Legal realists and attitudinalist political scientists have been peddling this view of the courts for decades, but it has not penetrated the consciousness of the public, which still regards "law" as something objective rather than the personal agenda of judges. But no one will believe a claim that same-sex marriage became a constitutional right when the States ratified the Fourteenth Amendment in 1868. A court that imposes same-sex marriage on the States can do so only by asserting that judges can change the meaning of the Constitution without using Article V, or by asserting that the Constitution delegates to the federal judiciary the

authority to impose never-before-recognized constitutional rights at moments of its choosing. Under either of these rationales, the *only* reason that the courts would be forcing same-sex marriage on the States is because federal judges want it to be legal in all 50 States and are not willing to wait for States to change their laws through democratic processes.

This is a dangerous precedent to establish—even for those who believe that same-sex marriage is good policy. If a right to same-sex marriage can be constitutionalized by judicial decree, then any policy can become constitutionalized through the courts. That will cause interest groups to increase their demands for judges who will impose their preferred policies from the bench, and the already dysfunctional judicial-confirmation process will become further poisoned as ideological conformity will override considerations of legal ability. Indeed, jurists who envision a modest or restrained role for the judiciary in resolving our nation's disputes—such as Oliver Wendell Holmes, Learned Hand, or Henry Friendly—will likely become un-appointable. When constitutional law becomes regarded as the plaything of judges, the focus of judicial appointments shifts away from finding jurists of ability and distinction, and toward finding judges who will impose policies that the President and Senate are unable to attain through democratic processes.

This is already beginning to happen. Jurists of immense talent and ability have been rejected, filibustered, or denied up-or-down votes by the Senate. Henry Friendly would not even be considered for a judicial appointment in the current administration, because he did

not think that federal courts should impose their views of abortion policy on the States. *See* A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J. L. Pub. Pol'y 1035 (2006). One can only imagine what new ideological "litmus tests" will be imposed as the federal judiciary moves to constitutionalize more areas of American public policy.

Liberals and progressives should be especially troubled by this prospect. Rule by judges is two-way street, and the judge-empowering interpretative methodologies propounded by the petitioners have historically been used by this Court to invalidate laws favored by liberals and progressives—much more so than they have been used to nullify laws favored by conservatives. *See Lochner*, 198 U.S. at 64; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down federal minimum-wage and maximum-hours regulations for poultry workers); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum-wage law for women); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Many liberals and progressives seem to believe that an invisible-hand mechanism will ensure that doctrines like "equal protection" and "substantive due process" will be used only to invalidate laws that liberals dislike, while conservative jurists play by the rules of judicial restraint. But there is no mechanism to ensure these happy endings. Once constitutional doctrines are severed from history and tradition—as the petitioners propose—then its use by future courts will depend entirely on the

outcomes of future Presidential and Senatorial elections, which no one can predict.

We close with an observation from one of the great appellate judges of the 20th century, Learned Hand, who wrote that the "spirit of liberty is that spirit which is not too sure that it is right." Learned Hand, *The Spirit of Liberty*, in Irving Dillard, ed., The Spirit of Liberty: Papers and Addresses of Learned Hand 189, 190 (1953). A judge's personal belief in the rightness of a cause has never been a reliable measure for determining whether a ruling will withstand the test of history. *See Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Lochner*, 198 U.S. 45; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Buck v. Bell*, 247 U.S. 200 (1927) (Holmes, J.). Issues are often more complex than judges think, and their legal training gives them no comparative advantage in resolving the complex empirical questions and value judgments that go into deciding whether same-sex marriage should be legal.[7]

This Court would do well to follow Judge Hand's admonition.

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[7] *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1292 (1997) ("[A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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